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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRY INC. (a corporation),
Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, Director of Agriculture of the State of California; C. J. CAREY, Chief; E. E. BROWN, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California,
Appellees.

Appeal from the Supreme Court of the State of California.

SUPPLEMENTAL BRIEF FOR APPELLEES, WITH APPENDIX.

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Table of Contents

		Page
I.	Preliminary statement	1
II.	Summary of argument	2
III.	Argument	3
	A. The State of California has the power specially to license persons legitimately within its jurisdiction to do business as fluid milk distributors upon such terms and conditions as the State of California may lawfully impose	3
	1. The State of California lawfully imposed as a condition to the granting of the special distributor's license to the appellant distributor that it should not buy or sell fluid milk within the defined geographic boundaries of the Santa Clara County Marketing Area below the prescribed minimum prices for such fluid milk	3
	2. The milk control statute of the State of California operates on the person of the licensee distributors. It does not operate on any consumer of fluid milk, including agencies of the federal government	6
	B. The economic consequences of a reversal of the decision of the California State Supreme Court would be to upset the milk stabilization plan of the State of California	9
IV.	Conclusion	13
Appendix:		
	Affidavit of Harold G. Claudius, manager of Consolidated Milk Producers for San Francisco regarding effect on producers of sales by State distributors to federal agencies at below State minimum prices	i

Table of Authorities Cited

Cases

	Pages
Collins v. Yosemite Park and Curry Company, 304 U. S. 518	5
Rainier Nat. Park v. Martin, 18 Fed. Supp. 481	5
Schecter Poultry Corp. v. U. S., 295 U. S. 495	14

Statutes

California Agricultural Code, Chapter 10, Div. IV, 735.3(h)	3, 4
California Constitution, Article XXI, Sec. 1	5

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I. PRELIMINARY STATEMENT.

References to opinions below, the statute involved, the jurisdictional statement, and a statement of the facts of the case need not be repeated.

The purpose of this brief is to supplement the argument made in appellee's original brief, with particular reference to the effect of a reversal of the State Supreme Court's decision on the fluid milk producers of California.

II. SUMMARY OF ARGUMENT.

A. The State of California has the power specially to license persons legitimately within its jurisdiction, to do business as fluid milk distributors upon such terms and conditions as the State of California may lawfully impose.

1. The State of California lawfully imposed as a condition to the granting of a special distributor's license to the appellant distributor that it should not buy or sell fluid milk within the defined geographic boundaries of the Santa Clara County Marketing Area below the prescribed State minimum prices for such fluid milk.

2. The Milk Control statute of the State of California operates on the person of the licensee distributors, including appellant. It does not operate on any consumer of fluid milk, including agencies of the federal government.

B. The economic consequence of a reversal of the decision of the California State Supreme Court would be to upset the milk stabilization plan of the State of California.

III. ARGUMENT.

A. THE STATE OF CALIFORNIA HAS THE POWER SPECIALLY TO LICENSE PERSONS LEGITIMATELY WITHIN ITS JURISDICTION TO DO BUSINESS AS FLUID MILK DISTRIBUTORS UPON SUCH TERMS AND CONDITIONS AS THE STATE MAY LAWFULLY IMPOSE.

There is no contention that the State of California is without power to regulate the milk industry in the manner in which it is being regulated in California. The appellant distributor (R. 1) expressly alleges that it is "licensed as a distributor of fluid milk, in accordance with and by virtue of the aforesaid Chapter 10, Div. IV of the Agricultural Code".

1. The State of California lawfully imposed as a condition of the granting of a special distributor's license to the appellant distributor, that it should not buy or sell fluid milk within the defined geographic boundaries of the Santa Clara Marketing Area, below the prescribed minimum prices for such fluid milk, or violate the provisions of any stabilization and marketing plan formulated under the applicable provisions of the Agricultural Code.

Whether approached from the Hamiltonian or the Jeffersonian theory of our union, these facts, inexorable and clear, remain:

1. The Legislature of the State of California has declared that the health and the welfare of the State of California required the passage of the Milk Control law, and it made the law applicable to all areas within the State of California.

2. The law is applicable to all *persons* subject to the jurisdiction of the State of California.

There is no assertion, insofar as appellant is concerned, that the Director of Agriculture unlawfully and im-

properly included Moffett Field as a part of the Santa Clara County marketing area. For the purposes of the California milk control statute, *and the distributor licensees on whom the statute operates*, Moffett Field is within the geographical limits of the State.

It inevitably follows that the fluid milk distributors specially licensed by the State of California to operate in the Santa Clara County marketing area are obliged to sell milk everywhere in that area, *no matter who the purchaser may be*, at prices not below the minimum prices fixed by the Director of Agriculture for the Santa Clara County marketing area; and likewise that such specially licensed distributors are obliged to pay their shippers of milk the statutory price fixed by the State Director.

The penalty for their failure to obey laws found by the Legislature and the Courts as essential to the public health is the forfeiture of their licenses.

The nub of this case is the meaning of the phrase "within this State", because that phrase defines and bounds the limits of the California Act, and it is within those limits that the California State Director of Agriculture has the power to designate marketing areas for fluid milk; that phrase designates the orbit of his authority.

In Chapter 10 of Division IV of the California Agricultural Code, Section 735.3(h) it is provided that:

> "A marketing area is any area *within this State* declared to be such in the manner prescribed in this chapter."

The term "*within this State*" as used in the California Milk Control law does and must mean within the *geographical* boundaries of the State of California.

The Constitution of the State of California, in Article XXI, Section 1, defines the boundaries of the State of California, and by reference thereto it will be found that all of Santa Clara County is included within those geographical limits. Therefore, by application to the law and its definitions, it is found that the Director is given power by the California Legislature to include Moffett Field, because it is territorially within the boundaries of this State, within any marketing area he may establish.

This is not stated without authority. The United States Supreme Court, in the case of *Collins v. Yosemite Park and Curry Company*, 304 U. S. 518, at p. 535, 82 L. Ed. 1502 (1937), specifically there said:

> "The Act is restricted to sales 'in this State', but that term embraces all territory within the geographical limits of the State."

In *Rainier Nat. Park v. Martin*, 18 Fed. Supp. 481 (1937), affirmed without opinion in 302 U. S. 661, 82 L. Ed. 511 (1938), the conclusion was also reached that the term "in this State", set forth in the Washington Retail Sales Tax Act, included retail sales made in Rainier National Park, which was territory ceded to the Federal Government by the State of Washington. It was there aptly said:

> "The terms 'in this state' and 'within this state' as here used obviously mean within the geographical limits of the state. The park is within those limits, and the area comprising the park is not by such terms excluded from the other areas where the tax is obviously applicable."

The power of the State, or the Director in this case, to include physically Moffett Field within the Santa Clara County marketing area cannot be disputed.

The fact that, in the marketing order for the Santa Clara County area, Moffett Field may be within the physical limits of the area so designated and created, does not indicate abuse of power by the Director of Agriculture of the State of California. Nor does it constitute an infringement, upon the Federal Government's exclusive jurisdiction over Moffett Field.

The Court below concluded that the California Milk Control Act regulates not the federal agencies within the State of California, but the distributors who are independent contractors with the Federal Government, and this characterization of the Act we assume is a conclusive interpretation of the State law.

2. The milk control statute of the State of California operates on the person of the licensee distributors. It does not operate on any consumer of fluid milk, including agencies of the federal government.

The Milk Control Law, in so far as this case is concerned, operates *in personam*, that is against the person of the distributor over whom the state has already acquired jurisdiction and control by means of his submission to the licensing feature of the law.

The stabilization plan put into effect by the Director for the Santa Clara County marketing area, in so far as the situation here is concerned, operates upon the person of the distributor and not upon the commodity itself. In this respect it is akin to the power of a court of equity to control, through an *in personam* decree, acts or property without its territorial jurisdiction.

In the Neutrality Act, it is provided that the President of the United States has the power to fix zones through which the merchant marine of the United States may not navigate. The fact that those zones are beyond the territorial jurisdiction of the United States would not invalidate the Act itself or the administrative ruling of the executive fixing those zones.

With respect to the Neutrality Act, the President of the United States has no jurisdiction in waters foreign to our own soil, but by reason of his jurisdiction over the merchant marine he can enforce his orders setting up the neutrality zones. This is no more than what we contend to be the power of the Director of Agriculture in this case. He has *no jurisdiction over Moffett Field,* but he has full jurisdiction over the distributors, licensed by him, and through his jurisdiction over the distributors, whom he licenses, he can enforce his orders in so far as they pertain to the maintenance of minimum prices set for the Santa Clara County marketing area.

The federal agency here involved is in the same position as any other consumer. It has the same, but no greater rights than any other consumer.

It enjoys the same protection against high prices and impure milk that every other purchaser of milk within the State of California enjoys.

Should the law be broken down because of the infinitesimal burden upon the federal agency when its uniform enforcement is so vital to agriculture and health and welfare of the people of this State?

It should be borne in mind that the stabilization plan established by the Director does not operate upon the consumer at all, except for his benefit.

The stabilization plan is in effect a protection to the consumer, but the consumer is free to do as he sees fit—to buy or not to buy milk, or to buy milk at a price below that set by the Director of Agriculture. Should the consumer buy milk below the price set by the Director in any marketing area, the distributor or retailer who sells to him is guilty of a violation of the Act, but the consumer himself is guilty of no violation of the Act.

Thus, in this case the federal agency, if a distributor agrees to furnish it with milk below the statutory minima, has committed no offense except the moral offense of one sovereign violating the established policy of another sovereign.

Therefore, the Act in the instant case does not directly affect or attempt to regulate the Federal Government. It only incidentally affects the price which the Government may pay for its milk. And, therefore, the State of California in no way infringes upon the jurisdiction of the Federal Government except in the remote manner in which the exercise of the State's police power affects it.

Of course, the State of California cannot regulate an instrumentality of the United States. On the other hand, an institution of the Federal Government such as the Letterman General Hospital in San Francisco, or Moffett Field in Santa Clara County, cannot wholly escape every consequence arising from a fact so pervasive and so insistent as is the *fact* of its location in the midst of a civilized community whose orderly existence and continuance are derived from another sovereignty of general powers.

No attempt is made in the California law, or in the stabilization and marketing plan of the State Director of

Agriculture, to control or give direction to federal agencies wherever situated.

The control is over, and the direction is given to licensees of the State of California, who obtained their licenses upon their agreement, *in futuro*, to charge not less than the minimum prices determined by him.

Federal agencies are similarly affected by telephone rates, heat and light bills, and water rates. They pay common carrier rates to railroads. We are unable to see any reason why distributors should not be required, in their dealings with such agencies to obey this reasonable and proper California law.

B. THE ECONOMIC CONSEQUENCE OF A REVERSAL OF THE DECISION OF THE CALIFORNIA STATE SUPREME COURT WOULD BE TO UPSET THE MILK STABILIZATION PLAN OF THE STATE OF CALIFORNIA.

If the fluid milk distributors, specially licensed by the State of California, are to be released from their obligations to obey this State law, whenever in the course of their contacts with federal agencies located upon ceded territory, it is convenient for them to be thus released, the time will arrive when the encroachments upon the public order of the States will be very substantial.

It should be emphasized that such a release would mean not only that the distributors might charge what they pleased for fluid milk, *but also that the producer, who has no participation or say in such transactions would be paid what the distributors wanted to pay them.*[1]

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[1]See affidavit of Harold G. Claudius in the appendix to this brief, giving documentation on what the producer receives when the milk control law breaks down.

We live in an age in which the various Legislatures deal, in large part, with the economic life of the various States. They often do so, as here, by regulations and orders to their citizens. They often do so, as here, by licensing their citizens to do business upon certain terms and conditions. Sometimes the conditions are conditions precedent. An example of that would be a showing of satisfactory moral character prior to the issuance of a license. Sometimes the conditions are conditions subsequent. An example of that is this very case, in which the distributor-appellant, when it obtained its license to do business as a distributor, agreed that subsequent to the time the license was issued, it would not sell milk within the boundaries of the marketing area at below the prices fixed by the Director of Agriculture.

Why is it important that this condition should be maintained?

The producer, that is, the farmer who sells his milk to a distributor does not know at the time the sale is made what price he will eventually receive for the milk. Neither, for that matter, does the distributor know what price he can eventually pay the producer, even though he complies with the minimum prices set by the State Director.

On one day, for example, the consumers in the San Francisco marketing area may drink fifty-nine thousand gallons of milk. The next day the demand might drop to fifty-five thousand gallons. The demand for milk fluctuates from day to day, but both the producer and the distributor must be in a position to meet that demand.

How do they do it? They do it by having sufficient milk available for all purposes. Thus, although all of the milk

shipped into San Francisco is fluid milk designed for human consumption, not all of it is so used. This surplus is commonly called "stand by". The producer is paid in accordance with the use to which the milk is put. If the consumer drinks it, the farmer is supposed to be paid the full price. If he doesn't, the milk is otherwise disposed of, and the farmer gets a lower price.

The distributor supplies the needs of his customers by the delivery of milk for human consumption. This milk is known as Class I milk, and for this milk the distributor receives or should receive at least the minimum price set by the Director of Agriculture.

But the remainder of the milk, if there is any excess, must be sold or disposed of as cream, for manufacturing purposes, or to be manufactured into other milk products. And for that excess, the distributor does not receive as high a price as he does for milk sold as fluid milk. Nor does he pay the farmer as much for milk so sold.

Class I milk, or milk sold for human consumption as fluid milk, thus brings the highest price. But since neither the distributor nor the producer knows from one day to the next how much of the milk will be sold as Class I milk, it is impossible to fix a price, fair to both, *at the time of the delivery of milk by the producer to the distributor.*

The distributor at the end of the month, or other period, as arrangements between him and the producer may require, settles his accounts and fairly apportions to the various classifications of milk the milk received from a particular producer and pays the producer accordingly. The price so paid to the producer of the milk is known as a "blended price".

In short, even where conditions are ideal,—even where the distributor obeys the regulations of the Director and charges the minimum prices established,—the producer does not receive a flat price, but a blended price. And he does not know, until the expiration of at least a thirty day period, what that blended price will be.

And whether he receives 50 per cent, or 60 per cent, or 70 per cent of the Class I price is unknown to him until long after the sales by the distributor have taken place.

Where, as here, the distributor breaks down the minimum prices established by the Director, the breakdown is not absorbed by the distributors, but is passed on to the farmer.

Where Class I milk is sold by the distributor *below* the price fixed by the Director for a marketing area, the situation is even worse. The distributor pays the producer proportionately upon the basis of *that lower* price, and not upon the basis of the established minimum. The producer receives less than the Act and the orders of the Director specify. The evils which the Act seeks to correct remain uncorrected. The conditions which the California Legislature sought to remedy remain uncorrected, and the entire structure of the stabilization plan established by the Director in a marketing area is upset.

That the producers of milk are injuriously affected by such a defeat of the expressed legislative will there can be no doubt. That the injury to the farmer has its resultant effect upon the consumer also cannot be doubted. By this debilitating process, the purchasing power of the producer is reduced. His ability to maintain a high standard for

his herd of dairy animals is likewise curtailed. Indeed, in some circumstances he will be forced out of business. These conditions are then reflected in a lower quality of milk produced and a lessening of the supply thereof to the detriment of the citizens of the State whose health and safety are jeopardized. Past experience has shown that serious curtailment of the milk supply has resulted directly from such price cutting practices.[2]

IV. CONCLUSION.

While it might be contended that the central aim of the federal government today is, in theory and in fact, to augment its power, and to drive ever larger and larger pipes into the diminishing reservoir of states' rights, that aim of political centralism has been checked in part, at least, by the recent cases.

Courts, state and federal, are coming more and more to the realization that there is actually no more evidence for the wisdom of an overcentralized federal government than there is that Friday is an unlucky day; to a realization, as well, that Mr. Justice Brandeis was right in finding for the states, ample scope in the Constitution—within their ambit. States, he felt, should not be hampered in dealing with evils at their point of pressure. Nor should the widest opportunity for experimentation be denied them by a construction of the Constitution, which would, in the words of Mr. Justice Cardozo "obliterate the distinction

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[2]The rapidly increasing populations in federal enclaves due to the war makes it more important that a realistic solution of the problem be reached.

between what is national and what is local in the activities of commerce". (*Schecter Poultry Corp. v. U S.*, 295 U. S. 495, 554, 79 L. ed. 1570 (1935).)

So far as the minimum prices for milk set up by the Director of Agriculture enter into the cost of milk purchased by the federal government agencies at Moffett Field, that is but a normal incident of the organization within the same territory of two independent sovereignties.

Dated, San Francisco, California,
January 6, 1943.

Respectfully submitted,

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(Appendix Follows.)

Appendix

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRIES, INC.,
Appellant,
vs.
DEPARTMENT OF AGRICULTURE, STATE OF CALIFORNIA, et al.,
Respondent.

AFFIDAVIT OF HAROLD G. CLAUDIUS,

Manager of Consolidated Milk Producers for San Francisco regarding effect on producers of sales by State distributors to Federal Agencies at below State minimum prices.

State of California,
City and County of San Francisco—ss.

Harold G. Claudius, being first duly sworn, deposes and says:

1. He is the Manager of Consolidated Milk Producers for San Francisco, a non-profit cooperative marketing corporation, organized and existing under and by virtue of the laws of the State of California, consisting of 165 members, all of whom are producers of fluid milk shipped to milk distributors shipping into the Santa Clara County, Alameda County and the San Francisco fluid milk marketing areas; that he has been duly authorized by the Board of Directors of Consolidated Milk Producers for San Francisco to make this affidavit on its behalf; that included

within said milk marketing areas are numerous federal enclaves.

2. The fluid milk so shipped to the San Francisco fluid milk marketing areas by the members of Consolidated Milk Producers for San Francisco is designed to be used for and to be consumed as fluid milk, and is so used and consumed within the limits of said San Francisco marketing area for fluid milk.

3. Of the total approximate 59,000 gallons of fluid milk used daily in the said San Francisco fluid milk marketing area, the members of petitioner ship daily to said area for use therein approximately 45,000 gallons of fluid milk.

4. Consolidated Milk Producers for San Francisco has an interest in the maintenance of stable and uniform prices to its members for such fluid milk used for and consumed as fluid milk, as provided in the stabilization and marketing plans of the California Director of Agriculture for the Santa Clara County, Alameda County and San Francisco marketing areas in this: that unless such stable and uniform prices provided therein are maintained for said fluid milk, the members of Consolidated Milk Producers for San Francisco will not receive the minimum prices therefor provided by California law, and the orders of the Director of Agriculture of the State of California made pursuant thereto; that unless the members of Consolidated Milk Producers for San Francisco and other producers of fluid milk do receive the said minimum prices provided by law, they will be unable to produce fluid milk of the grade and quality required by law, and will be unable to continue to produce fluid milk for sale to distributors in the various milk marketing areas.

5. Consolidated Milk Producers for San Francisco has an interest in the maintenance of the minimum wholesale and retail prices heretofore established by the Director of Agriculture of the State of California for the Santa Clara County, Alameda County and San Francisco fluid milk marketing areas, and other marketing areas throughout California in this: that unless said minimum wholesale and retail prices are maintained, the fluid milk distributors operating in said marketing areas and the other marketing areas in California will be unable to pay to the members of Consolidated Milk Producers for San Francisco and those similarly situated, the minimum prices required by law; and the members of Consolidated Milk Producers for San Francisco, and all those producers similarly situated, will receive far less than the minimum prices established by the Director of Agriculture of the State of California as necessary to effectuate the provisions and policies of Div. IV, Ch. 10 of the Agricultural Code of the State of California; with the result that the legislative purpose, namely to enable the dairy industry, with the aid of the State of California, to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk, will be defeated; and unfair, unjust, and demoralizing trade practices will be encouraged in the production, marketing, processing, and distribution of fluid milk in said San Francisco marketing area and to the injury of the members of Consolidated Milk Producers for San Francisco, and other producers of fluid milk in the State of California similarly situated, inferior standards of milk production and finally injurious effects on the public health.

6. Prior to the decision of the Supreme Court of the State of California in the above entitled case (namely the case of *Pacific Coast Dairy Inc., a corporation, petitioner, vs. Department of Agriculture of the State of California,* No. S. F. 16,694 on the files of said Supreme Court of the State of California), great confusion existed, to affiant's personal knowledge, in the minds of public officials, state and federal, as to whether, (1) under the California Act regulating the marketing and distribution of fluid milk and cream, fluid milk distributors were obliged to charge agencies of the United States the minimum prices established by the State Director of Agriculture, and, (2) whether, when such fluid milk distributors sold fluid milk to agencies of the United States at prices below the minima established by the California Director of Agriculture, they were required to pay to the producers of such fluid milk the minimum prices established by the California Director of Agriculture.

7. As a result of the uncertainty in interpretation of the law, many fluid milk distributors, both in the San Francisco fluid milk marketing area and elsewhere throughout the State of California, sold fluid milk to federal agencies at below the minimum prices established by the Director of Agriculture of the State of California; and such fluid milk distributors, in turn, paid the producers of such fluid milk, prices far below the prices established by the Director of Agriculture of the State of California, with a resulting loss to the producers of many thousands of dollars; that typical of the conditions existing in the various fluid milk marketing areas of the State of California, prior to the decision of the Supreme Court of California in the above entitled case are the sales by fluid

milk distributors to federal agencies and the prices by such fluid milk distributors to the fluid milk producers as described in paragraphs 8 through 18 of this affidavit.

8. On December 23, 1940, the Director of Agriculture of the State of California issued his General Order No. 116 declaring in effect as of January 1, 1941, schedules of zation and marketing plan for fluid milk as amended, together with rules and regulations pertaining thereto, for the San Francisco marketing area for fluid milk.

9. On December 23, 1940, the Director of Agriculture of the State of California issued his General Order No. 116 declaring in effect as of January 1, 1941, schedules of minimum wholesale and minimum retail prices for fluid milk as amended, together with rules and regulations pertaining thereto for the San Francisco marketing area for fluid milk.

10. On January 24, 1941, respondent, as Director of Agriculture, through the Bureau of Markets of the State Department of Agriculture, in accordance with the provisions of Table I of Article I of the stabilization and marketing plan, issued an order effective February 1, 1941, whereby the price to be paid to producers (including the members of Consolidated Milk Producers for San Francisco) by distributors for Class I fluid milk in the San Francisco area was fixed at 69¢ per pound milk fat in accordance with the provisions of Table I of Article I of the stabilization and marketing plan for fluid milk, as amended. This order became effective on February 1, 1941. In the same order of January 24, 1941, the Director of Agriculture of the State of California made effective, as of February 1, 1941,

the minimum wholesale and minimum retail prices for fluid milk contained in Schedule 4 of General Order No. 116 for the San Francisco marketing area.

11. Schedule 4 of General Order No. 116 for the San Francisco marketing area provided that the minimum wholesale price for fluid milk in quart containers should be 9½¢ per quart, and that the minimum wholesale price of fluid milk in half pint containers should be 3⅛¢ per half pint.

12. Under the provisions of section 1 of the rules and regulations of the Director of Agriculture of the State of California for the San Francisco marketing area, the minimum wholesale prices for fluid milk established for the San Francisco marketing area were declared to apply to all purchases of fluid milk made by agencies of the United States government, State of California, county, city, or other political subdivision of the State of California, hospitals or similar institutions, located within the geographical boundaries of said marketing area, and each of the fluid milk distributors operating and located in said San Francisco marketing area, affiant is informed by the California State Department of Agriculture, and believes, received a copy of said rules and regulations.

13. On March 7, 1941, the United States Quartermaster Supply Officer, San Francisco General Depot, located at Fort Mason, within territory ceded to the United States of America, generally known as the "Presidio", which is wholly within the geographical limits of the City and County of San Francisco and within said San Francisco marketing area, issued standard government form of invitation for bids (Supply Contract) No. 92-41-896—

Subsistence for the supplying, within the time specified, namely from April 1, 1941, to and including April 30, 1941, of 17,625 gallons of fluid milk, in quart and half-pint containers, to federal agencies located within the Presidio and within the geographical limits of the City and County of San Francisco and within said San Francisco marketing area. These invitations for bids called for the delivery of fluid milk to certain federal agencies located within the boundaries of the San Francisco Presidio in the following quantities and containers:

1. Milk, fresh, type II, Grade A, pasteurized, 6500 quarts in glass bottles to Letterman General Hospital in San Francisco.

2. Milk, fresh, type II, Grade A, pasteurized, 15,000 quarts in glass bottles to Fort McDowell in San Francisco.

3. Milk, fresh, type II, Grade A, pasteurized, 180,000 half-pints, in glass bottles or fibre containers to the Presidio in San Francisco.

4. Milk, fresh, type II, Grade A, pasteurized, 16,000 half-pints in glass bottles to Letterman General Hospital in San Francisco,

14. The opening date for bids to these federal agencies was Tuesday, March 25, 1941, at 10 A. M. at said Fort Mason; at said time and place various distributors of fluid milk, licensed as such distributors by the State of California, located in, and doing business within, the geographical boundaries of the San Francisco marketing area for fluid milk filed with the said Quartermaster Supply Officer their respective bids, proposing to furnish,

during the period April 1st to April 30, 1941, fluid milk to the various federal agencies described above in the quantities and in the containers as set forth in Government invitation to bid.

15. Among the bids so made at said time and place was the bid of Marin Dairymen's Milk Company, Ltd., a corporation duly licensed to do business in the State of California, with its principal place of business in the City and County of San Francisco, State of California, and within the geographical boundaries of said San Francisco marketing area; said distributor of fluid milk held and now holds a special distributor's license to deal in fluid milk, issued by Director of Agriculture of the State of California; also among said bids was the bid of Bell Brook Dairies, Inc., a corporation duly licensed to do business in the State of California, with its principal place of business in the City and County of San Francisco, State of California, and within the geographical boundaries of said San Francisco marketing area; said distributor of fluid milk held and now holds a special distributor's license to deal in fluid milk, issued by Director of Agriculture of the State of California; and also among said bids was the bid of Spreckels-Russell Dairy Co., Ltd., a corporation duly licensed to do business in the State of California, with its principal place of business in the City and County of San Francisco, State of California, and within the geographical boundaries of said San Francisco marketing area; said distributor of fluid milk held and now holds a special distributor's license to deal in fluid milk, issued by the Director of Agriculture of the State of California.

16. These distributors, described in the preceding paragraph of this affidavit, made bids to supply fluid milk to said federal agencies at prices less than the minimum wholesale prices for fluid milk in such containers fixed by the said Director of Agriculture in his General Order No. 116, and said bids were, on the 25th day of March, 1941, accepted by the Quartermaster Supply Officer, San Francisco General Depot, for and on behalf of the various federal agencies described; specifically said bids to supply said fluid milk to the aforesaid federal agencies were in the quantities, containers, and prices hereinafter specified:

a. Bell Brook Dairies, Inc., a corporation, made a bid to supply milk, fresh, type II, Grade A, pasteurized, 6500 quarts in glass bottles to Letterman General Hospital, located within the geographical boundaries of the San Francisco marketing area for fluid milk, at a unit price of $.08075 per quart, less 5%, or at a total amount of $498.63; whereas the minimum wholesale price for such milk in the quantity and container specified, under General Order No. 116 of the Director of Agriculture of the State of California, should have been a unit price of $.095 per quart, less 5%, or a total amount of $586.63.

b. Spreckels-Russell Dairy Co., Ltd., a corporation, made a bid to supply milk, fresh, type II, Grade A, pasteurized, 15,000 quarts in glass bottles to Fort McDowell, located within the geographical boundaries of the San Francisco marketing area for fluid milk, at a unit price of $.085 per quart, less 5%, or at a total amount of $1211.25; whereas the minimum wholesale

price for such milk in the quantity and container specified, under General Order No. 116 of Director of Agriculture of the State of California, should have been a unit price of $.095 per quart, less 5%, or a total amount of $1353.75.

c. Marin Dairymen's Milk Company, Ltd., made a bid to supply milk, fresh, type II, Grade A, pasteurized, 180,000 half pints, in glass containers to the Presidio of San Francisco, located within the geographical boundaries of the San Francisco marketing area for fluid milk, at a unit price of $.0224 per half pint, less 5%, or a total amount of $3830.40; whereas the minimum wholesale price for such milk in the quantity and container specified, under General Order No. 116 of the Director of Agriculture of the State of California, should have been a unit price of $.0315, less 5%, or a total amount of $5386.50.

d. Bell Brook Dairies, Inc., a corporation, made a bid to supply milk, fresh, type II, Grade A, pasteurized, 16,000 half pints in glass containers to the Letterman General Hospital in San Francisco, and located within the geographical boundaries of San Francisco marketing area for fluid milk, at a unit price of $.0264, less 5%, or a total amount of $401.28; whereas the minimum wholesale price for such milk in the quantity and container specified should, under General Order No. 116 of the Director of Agriculture of the State of California, have been a unit price of $.0315, less 5%, or a total amount of $478.80.

17. All of the fluid milk distributors described in paragraph 15 of this affidavit are distributors of fluid milk

within the said San Francisco marketing area and supplied fluid milk in accordance with their bids to said federal agencies for the period of April 1, 1941, to and including April 30, 1941; said distributors of fluid milk, in order to comply with the terms of their said bids paid the members of Consolidated Milk Producers for San Francisco, and other producers of fluid milk for said San Francisco marketing area similarly situated, prices far below the minimum prices established by respondent in his General Order No. 115.

18. As a result of the sales described in paragraphs 13 through 17 of this affidavit, and other sales of a similar nature, the members of Consolidated Milk Producers for San Francisco and those producers similarly situated, did not receive the 69¢ per pound milk fat ordered to be paid by the Director of Agriculture of the State of California for their milk shipped into the said San Francisco marketing area and sold for the period in question, but on the contrary receive a blended price of not more than 59¢ per pound milk fat.

19. Affiant is informed by the Bureau of Markets of the State Department of Agriculture, and believes that, prior to the decision of the Supreme Court of California in the above entitled case, such sales at below state minimum prices, and corresponding payment to producers at far below the minimum prices as described in paragraphs 13 through 17 of this affidavit were frequent and many; and that as a result thereof a general breakdown in the price structure for fluid milk as set up in the stabilization and marketing plans of the Director of Agriculture of the State of California was threatened, together with

a general breakdown in the schedule of minimum wholesale and minimum retail prices set up by the said Director of Agriculture.

20. Since the decision of the Supreme Court of the State of California in the above entitled case on March 12, 1942, affiant is informed by the Bureau of Markets of the State of California, and believes, that the licensed distributors of fluid milk in the various fluid milk marketing areas of the State of California, have uniformly charged for fluid milk sold to federal agencies, the minimum prices established by the Director of Agriculture of the State of California, and such fluid milk distributors have, in turn, paid the producers of such fluid milk the price which the Director of Agriculture of the State of California has found necessary to safeguard the public health.

21. Since 1941, and particularly since the outbreak of war, the increase in the consumption of fluid milk in federal enclaves located within the geographical boundaries of the State of California has increased enormously; that as of March, 1941, the average daily gallonage of fluid milk consumed in the San Francisco marketing area was approximately 45,000 gallons; that as of the date of the making of this affidavit, the average daily gallonage of milk consumed in the San Francisco marketing area is approximately 59,000 gallons; that of this increased consumption a large proportion (the amount whereof, for military reasons, affiant is unable to state) is consumed in federal enclaves located within the geographical boundaries of the San Francisco marketing area; that in the various other fluid milk marketing areas of California there

has been a similar large increase in the consumption of fluid milk in such federal enclaves as Fort Baker, Fort Barry, Benicia Arsenal Reservation, Fort Cronkhite, Fort Funston, Hamilton Field, Fort MacArthur, Fort McDowell, March Field, Fort Mason, Mather Field, McClellan Field, Fort Miley, Moffett Field, Muroc Bombing Field, Camp Ord, Presidio of Monterey, and San Diego Barracks.

Harold G. Claudius,
Manager of Consolidated Milk Producers for San Francisco.

Subscribed and sworn to before me this.....day of January, 1943.

(Seal)

Notary Public in and for the City and County of San Francisco, State of California.

BRIEF ON BE-
HALF OF AMICUS
CURIAE

FILE COPY

JAN 11 1943
CHARLES ELMORE CROPLEY

No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1942

PACIFIC COAST DAIRY, INC., APPELLANT

v.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of Argument	6
Argument:	
I. The judgment sought to be reviewed is final within Section 237 of the Judicial Code	8
II. The State of California may not regulate the price at which milk is sold to the United States	14
III. California may not forbid the handling of milk in California, which is sold and delivered on territory subject to the exclusive jurisdiction of the United States at prices below those fixed by State law	18
A. California may not regulate conduct within her borders for the sole purpose of controlling the price at which milk is sold on territory subject to the exclusive jurisdiction of the United States	18
B. California may not erect barriers to commerce between California and territory subject to to the exclusive jurisdiction of the United States for the purpose of fixing the price at which her products are sold in such territory	30
Conclusion	40
Appendix	42

CITATIONS

Cases:

A. & P. Tea Co. v. *Grosjean*, 301 U. S. 412	28
Alaska Packers Assn. v. *Comm.*, 294 U. S. 532	24, 26, 28, 29
Allgeyer v. *Louisiana*, 165 U. S. 578	26, 28
Arlington Hotel Co. v. *Fant*, 278 U. S. 439	19
Baldwin v. *Seelig*, 294 U. S. 511	8, 37, 38, 39
Bandini Co. v. *Superior Court*, 284 U. S. 8	9, 10, 14
Bruce v. *Tobin*, 245 U. S. 18	9
Bryant v. *Zimmerman*, 278 U. S. 63	9, 13
Case of the State Freight Tax, 15 Wall. 232	39
Cohens v. *Virginia*, 6 Wheat. 264	32
Collins v. *Yosemite Park*, 304 U. S. 518	19
Columbian Insurance Co. v. *Wheelright*, 7 Wheat. 534	9

Cases Continued. Page

Compania General de Tabacos de Filipinas v. *Collector*, 275 U. S. 87 ..... 20, 26, 28
Conn. General Co. v. *Johnson*, 303 U. S. 77 ..... 20, 28
Consolidated Milk Producers v. *Parker*, 19 Cal. (2d) 815 .. 15, 19, 23
Cooley v. *Board of Port Wardens*, 12 How. 299 33
Crandall v. *Nevada*, 6 Wall. 35 34
Detroit, etc. Ry. v. *Michigan R. R. Comm.*, 240 U. S. 564 .. 9
East Ohio Gas Co. v. *Tax Commission*, 283 U. S. 465 30
Edwards v. *California*, 314 U. S. 160 39
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426 ..... 24, 26
Foster Packing Co. v. *Haydel*, 278 U. S. 1 39
Galloway v. *Bell*, 11 F. (2d) 558 32
Grays Harbor Logging Co. v. *Coats-Fordney Co.*, 243 U. S. 251 ..... 6, 11, 13
Hanley v. *Kansas City So. Ry. Co.*, 187 U. S. 617 31
Hartman v. *Greenhow*, 102 U. S. 672 9
Holmes v. *Jennison*, 14 Pet. 540 9
H. P. Hood & Sons, Inc. v. *United States*, 307 U. S. 588 40
Inter-Island Steam Navigation Co. v. *Hawaii*, 96 F. (2d) 412, affirmed, 305 U. S. 306 31
James v. *Dravo Contracting Co.*, 302 U. S. 134 19
Laisne v. *California State Board of Optometry*, 19 Cal. (2d) 831 11
Luxton v. *North River Bridge Co.*, 147 U. S. 337 13
Michigan Central v. *Mix*, 278 U. S. 492 ..... 9, 14
Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346 35
Mt. Vernon Cotton Co. v. *Alabama Power Co.*, 240 U. S. 30 .. 9, 10
National Union Fire Insurance Co. v. *Wanberg*, 260 U. S. 71 28
Nebbia v. *New York*, 291 U. S. 502 36
Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359 28
New York, Lake Erie & W. R. R. Co. v. *Pennsylvania*, 153 U. S. 628 ..... 26, 29
O'Donoghue v. *United States*, 289 U. S. 516 32
Osborn v. *Ozlin*, 310 U. S. 53 ..... 24, 26, 27, 30
Palmetto Fire Insurance Co. v. *Conn*, 272 U. S. 295 28
Parker v. *Brown*, No. 46, this Term 37
Penn Dairies, Inc. and the United States of America v. *The Milk Control Commission of the Commonwealth of Pennsylvania*, No. 399, this Term 7, 15, 17
Pennsylvania Gas Co. v. *Public Service Comm.*, 252 U. S. 23 .. 30
Pennsylvania v. *West Virginia*, 262 U. S. 553 39
Public Utilities Commission v. *Landon*, 249 U. S. 236 30
Sioux Remedy Co. v. *Cope*, 235 U. S. 197 25
Skirotes v. *Florida*, 313 U. S. 69 20
South Carolina Hwy. Dept. v. *Barnwell Bros.*, 303 U. S. 177 .. 34, 38
Southern Railway Co. v. *Postal Telegraph-Cable Co.*, 179 U. S. 641 13

Cases—Continued.

	Page
St. Louis, B. & M. Ry. v. *Taylor*, 266 U. S. 200	9, 14
St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346	26, 28
Standard Oil Co. v. *California*, 291 U. S. 242	19
State Board v. *Young's Market Co.*, 299 U. S. 59	39
Stewart & Co. v. *Sadrakula*, 309 U. S. 94	19
Stoulenburgh v. *Hennick*, 129 U. S. 141	32, 33
Surplus Trading Co. v. *Cook*, 281 U. S. 647	19
Terral v. *Burke Construction Co.*, 257 U. S. 529	25
United States v. *Beatty*, 232 U. S. 463	13
United States v. *Rock Royal Co-operative*, 307 U. S. 533	40
United States v. *Unzeuta*, 281 U. S. 138	19
United States v. *Wrightwood Dairy*, 315 U. S. 110	40
Washington ex rel. McPherson Bros. Co. v. *Superior Court*, 274 U. S. 726	13
Washington ex rel. Perry v. *Superior Court*, 278 U. S. 575	13
Weston v. *City Council of Charleston*, 2 Pet. 449	9
Wick v. *Superior Court*, 278 U. S. 575	11
Wisconsin v. *J. C. Penney*, 311 U. S. 435	17, 28
Constitution and Statutes:	
U. S. Constitution, Art. I, § 8	16, 18, 29, 31, 33
Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 601, *et seq.*)	35, 40
State Statutes:	
California Milk Control Act (Cal. Agric. Code (Deering, 1937) Div. 4, c. 10, §§ 735–738, as amended Cal. Agric. Code (Deering, 1941 supp.), pp. 462–474):	
Sec. 735	14, 42
Sec. 736.3	14, 17, 22, 23, 35, 43
Sec. 736.10	14
Sec. 736.11	44
Sec. 736.12	14
Sec. 736.13	14, 15, 45
Sec. 737.7	14
Cal. Stats. 1935, p. 922	14
Cal. Stats. 1937, pp. 1372, 1376	14
Cal. Stats. 1941, Concurrent and Joint Resolutions, c. 65, p. 3402	23
Cal. Stats. 1941, c. 1214, p. 3011, sec. 3	23
Miscellaneous:	
Farrand, *Records of the Federal Convention*:	
Vol. II	37
Vol. III	37
Federalist, The, No. XLI	37
Federalist, The, No. XLII	34
H. Rep. No. 1241, 74th Cong., 1st Sess., pp. 22–23	36
Political Code of California, sec. 34	19
S. Rep. No. 1011, 74th Cong., 1st Sess., p. 15	36
U. S. Army Regulation 5–240 (g) (3)	17

In the Supreme Court of the United States

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No. 275

PACIFIC COAST DAIRY, INC., APPELLANT

v.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 12, 1942, the Court entered an order inviting the Solicitor General to file a brief in this case, and if he so desires to participate in oral argument (R. 31). This brief is filed pursuant to that invitation.

OPINION BELOW

The opinion of the Supreme Court of California (R. 14–26) is reported in 19 Cal. (2d) 818.

JURISDICTION

The judgment of the Supreme Court of California was entered March 12, 1942 (R. 14, 26).

The petition for appeal was filed (R. 26) and allowed on June 4, 1942 (R. 28). The jurisdiction of this Court is conferred by Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925. On October 12, 1942, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits, and requested counsel to discuss in briefs and on argument whether the judgment sought to be reviewed was final within Section 237 of the Judicial Code (R. 31).

QUESTIONS PRESENTED

1. Whether the denial by the Supreme Court of California of the petition for a writ of mandamus in the circumstances of this case is a final judgment within the meaning of Section 237 of the Judicial Code.

2. Whether the State of California may regulate the price of milk sold to the United States.

3. Whether the State of California may forbid the handling of milk in California which is sold and delivered on territory subject to the exclusive jurisdiction of the United States at prices below those fixed by state law.

STATUTES INVOLVED

The applicable portions of the Agricultural Code of California are set forth in the Appendix, *infra*, pp. 41–45.

STATEMENT

On November 5, 1941, appellant, Pacific Coast Dairy, Inc., was served with an order issued by the Chief of the Bureau of Market Enforcement of the California Department of Agriculture requiring appellant to show cause at a hearing why its license as a distributor of fluid milk should not be suspended or revoked because of alleged violations of the California Agricultural Code (R. 6–7). The order was based on a complaint filed by the Auditor of the Bureau of Market Enforcement (R. 7–10). The facts alleged in the complaint may be summarized as follows:

Appellant is a corporation organized under the laws of California, doing business in the Santa Clara County Marketing Area in the State of California, and is a licensed distributor of fluid milk as defined by Section 753.3 (f) of the California Agricultural Code (R. 8). The Santa Clara County Marketing Area was established by General Order No. 98 of the Director of Agriculture of the State of California (R. 8), and at all times here involved there were in effect in that Area a Stabilization and Marketing Plan and Schedules of minimum wholesale and retail prices for fluid milk (R. 9). On or about October 15, 1941, appellant entered into a contract with the War Department, signed by the Quartermaster's Department of Moffett Field, whereby appellant agreed to sell and deliver fluid milk to the War Department at Moffett Field at less than the minimum price es-

tablished in the Santa Clara County Marketing Area (R. 9). Moffett Field is located in Santa Clara County about thirty-five miles southeast of San Francisco, California, and is in the geographical area within the outer, outside and external boundaries of the Santa Clara County Marketing Area as described in General Order No. 98 (R. 9).

The complaint alleged further that on or about November 1, 1941, appellant purchased, processed, bottled, transported and delivered in the Santa Clara County Marketing Area fluid milk which it sold at less than the effective minimum wholesale prices in the Area in violation of Section 736.3 (a) (6) of the Agricultural Code (Appendix, p. 42, *infra*), and concluded with a prayer that the Director of Agriculture hold a hearing and revoke appellant's license (R. 10).

On November 18, 1941 appellant filed a petition in the Supreme Court of California praying that a writ of mandamus issue directing appellees, who are officials of the State Department of Agriculture, to set aside the order to show cause issued on November 5, 1941 (R. 1–10). This petition, after stating the foregoing facts, alleged that Moffett Field was purchased more than fifteen years ago by the United States with the consent of the Legislature of California for the purpose of erecting forts, magazines, arsenals, dock-yards and other needful buildings (R. 4), that Moffett Field therefore is subject to the exclusive jurisdiction of the federal government (R. 4–5, 2) and that the State

of California has no jurisdiction over that area (R. 2). The petition also alleged that the acts of appellees constituted a wrongful and unlawful interference by the State of California with the administration of Moffett Field by the federal government in that the sales and deliveries complained of took place on Moffett Field (R. 2) that Section 736.3 (a) (6) of the Agricultural Code as applied was unconstitutional (R. 3) and that appellant was deprived of its property without due process of law. Finally, the petition set forth that appellant would suffer irreparable damage for which it had no adequate remedy at law (R. 3) and prayed for the writ of mandamus (R. 5–6).

On December 3, 1941, appellees moved to dismiss on the ground that the "petition does not state facts sufficient to constitute a cause of action or to enable petitioner to the relief prayed for in said petition or to any relief" (R. 12–13). Pursuant to leave of court, the United States filed a brief as amicus curiae (R. 14).

On March 12, 1942, the Supreme Court of California denied the petition for a writ of mandamus (R. 26). In its opinion (R. 14–26) the court concluded that Moffett Field was subject to exclusive federal jurisdiction (R. 22) but that the California statute as applied did not violate the Fourteenth Amendment (R. 17–21), was not invalid under the commerce clause of the Constitution (R. 21–25) and did not interfere with the governmental functions of the United States (R. 25–26).

SUMMARY OF ARGUMENT

I

The judgment denying the petition for a writ of mandamus is final and appealable under Section 237 of the Judicial Code. It is settled law that a special writ proceeding will ordinarily be regarded as a separate and distinct suit like replevin or ejectment, even though the judgment leaves some larger controversy undecided. The decision in *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, and the *per curiam* opinions following it do not throw doubt upon the principle. They resulted from the peculiar practice in the State of Washington of securing a writ of certiorari from the State Supreme Court to the Superior Court as an interlocutory appeal from an interlocutory order of the Superior Court condemning property for public use and ordering a hearing on the question of damages. The court held only that in this state of the local practice, the condemnation proceeding could not be regarded as broken into two separate suits. The mandamus proceeding in the instant case was plainly separate and distinct from the proceeding before the California Department of Agriculture.

II

California may not regulate the procurement of supplies for the United States Army and therefore may not regulate the price term of the contracts by which the United States Army purchases milk.

Although the section of the California Milk Control Act in question does not expressly fix the price, it is invalid for the same reasons as the Pennsylvania Milk Control Law. Those reasons are summarized at pages 14–17, *infra*, and are argued more at length in our brief in the companion case, *Penn Dairies, Inc. and the United States of America* v. *The Milk Control Commission of the Commonwealth of Pennsylvania*, No. 399, this Term.

III

A. The milk involved in the instant case was handled by appellant in California but was sold and delivery was completed on Moffett Field, which is territory under the exclusive jurisdiction of the United States. California was, therefore, powerless to regulate the sale; and this is admitted. It is said, however, that California can take appellant's license for handling in California milk later sold on Moffett Field at a price less than that specified by California. We submit that California cannot achieve the prohibited result by reliance upon this form of words. Appellant was not guilty of conduct in California which was itself contrary to the public policy of California. A State may not proscribe conduct within its jurisdiction for the purpose of regulating indirectly a subject beyond its competence to regulate directly because the Constitution has vested the power in Congress alone.

B. Under the commerce clause and under its power as both the general and local government to legislate for territory subject to its exclusive jurisdiction, the federal government has the same power to regulate commerce between a State and a federal enclave as it has to regulate commerce between two States. Similarly, that power is exclusive to the same extent as the power to regulate commerce between two States.

By the statute in question, California has expressly attempted to prohibit goods from flowing over her boundaries unless they are sold in the federal enclave at a price which California considers to be a sufficient return. But a State may not raise barriers to the movement of commerce and thus neutralize the consequences of free trade among the States and territories for the purpose of building up its local economy, even though ultimately the strengthening of the local economy will improve public health. *Baldwin* v. *Seelig*, 294 U. S. 511.

ARGUMENT

I

THE JUDGMENT SOUGHT TO BE REVIEWED IS FINAL WITHIN SECTION 237 OF THE JUDICIAL CODE

It is well settled by the decisions of this Court that an appeal may be taken under Section 237 of the Judicial Code from a final judgment in a proceeding for a writ of mandamus, prohibition or

habeas corpus. In such a case, two requirements must be met. First, the proceeding must be a separate suit. Second, the judgment must be dispositive of the suit, a matter which is "to be determined by the face of the record and the formal character of the judgment rendered" (*Bruce* v. *Tobin*, 245 U. S. 18, 19). Moreover, a judgment granting or denying an extraordinary writ ordinarily meets these two requirements, and is therefore appealable regardless of whether the judgment granting or denying the writ fails to dispose of some other, and larger, but separate controversy.[1] Such a proceeding is a separate suit just as much as an action of ejectment or replevin, or a proceeding in *quo warranto*. Cf. *Weston* v. *City Council of Charleston*, 2 Pet. 449, 464. A separate right is asserted—for example, to have another proceeding terminated which is doing irreparable damage to the petitioner—and is determined when the writ is granted or denied. Thus, in *Mt. Vernon Cotton*

[1] *Weston* v. *City Council of Charleston*, 2 Pet. 449 (prohibition); *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30 (prohibition); *St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200 (prohibition); *Michigan Central* v. *Mix*, 278 U. S. 492 (prohibition); *Bandini Co.* v. *Superior Court*, 284 U. S. 8 (prohibition); *Columbian Insurance Co.* v. *Wheelright*, 7 Wheat. 534 (mandamus); *Hartman* v. *Greenhow*, 102 U. S. 672 (mandamus); *Detroit, etc. Ry.* v. *Michigan R. R. Comm.*, 240 U. S. 564 (mandamus); *Holmes* v. *Jennison*, 14 Pet. 540 (habeas corpus); *Bryant* v. *Zimmerman*, 278 U. S. 63 (habeas corpus).

Co. v. *Alabama Power Co.*, 240 U. S. 30, 31, the Court held:

> * * * Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code * * *. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

The instant case meets both requirements. The mandamus proceeding in the Supreme Court of California was a distinct suit asserting the right to have the proceedings before the State Department of Agriculture terminated because they were unlawful and would do irreparable injury to the appellant. The suit was directed to that point and the judgment, which is final on its face, was dispositive. Indeed, there is no ground for distinction between the instant case and *Bandini Co.* v. *Superior Court*, 284 U. S. 8, which also arose in the Supreme Court of California. In the *Bandini* case the state court denied a writ of prohibition seeking to restrain enforcement of an injunction issued by an inferior state court against future violations of state law. This Court held that the judgment denying the writ was a "final judgment" in a "distinct suit," and that an appeal would lie. Although the writ in the *Bandini* case was prohibition, the writ of mandamus sought in the instant

case is for all practical purposes the same. Under California law administrative agencies cannot exercise judicial functions, and, since prohibition will issue only to arrest judicial or quasi-judicial proceedings, the writ of mandamus is used as a substitute. See *Laisne* v. *California State Board of Optometry*, 19 Cal. (2d) 831, 851–854.

The decisions in *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, and *Wick* v. *Superior Court*, 278 U. S. 575, do not lead to a contrary conclusion. In principle, they support our position that a judgment in a special writ proceeding is appealable if, first, the proceeding is a separate suit and, second, the judgment is final on its face. Both cases dealt with the peculiar procedure in condemnation cases in the courts of the State of Washington. Both decisions rested on the ground that in such cases the proceeding for a writ of certiorari in the State Supreme Court was not, under the State procedure, a separate suit but was a part of the condemnation proceeding. And the *Grays Harbor* case, if not the *Wick* case, also may rest upon the ground that the judgment was not final on its face. Both points are clear from the facts and the opinion in the *Grays Harbor* case, in which alone the Court delivered an opinion. The case was as follows:

A petition had been filed in the Superior Court of Washington to condemn certain lands. After a hearing, the Superior Court entered an order of

condemnation and set the cause down for a trial before a jury to determine and assess the damages. Under the Washington statutes, after an order of condemnation had been made and trial had taken place to determine the damages, an appeal would raise no question of the right to condemn but only the issue of damages. For this reason, the Washington Supreme Court granted a petition for certiorari in lieu of an appeal from the interlocutory order of condemnation and not as a separate proceeding. It then entered a judgment affirming the judgment of the Superior Court and "remitting the cause to that court for further proceedings." This Court dismissed a writ of error for want of jurisdiction because the state court judgment was not final. The opinion makes it clear that the ground of the decision was that the Court could not "in this state of the local practice" "regard a condemnation proceeding taken under the authority of the constitution of Washington and the Act of 1913 as severable into two distinct branches" (pp. 255, 256). The Court pointed out that orders condemning property and directing that a hearing be held on the question of damages were reviewed by the Washington Supreme Court "not because they are final, or are independent of the subsequent proceedings ascertaining the damages" but in order to allow an interlocutory appeal (p. 256). Since the proceedings were not separate, the case fell within the settled rule, established by

decisions cited in the opinion (p. 256), that an order in condemnation proceedings remanding the cause for the ascertainment of damages is not a final order.[2] Moreover, the order of the State Supreme Court was not final on its face because it expressly directed that the damages be ascertained, and conditioned the passing of title upon payment (p. 254); thus it failed also to meet the second requirement of appealability.

There is nothing, therefore, in the *Grays Harbor* case, or in the line of *per curiam* opinions following it,[3] to suggest that the Court intended to modify the well settled rule that a special writ proceeding would be regarded as a separate suit, terminating in a final and appealable judgment, if in the state courts it was a separate proceeding. On the contrary, the Court has recognized that those condemnation cases, arising from the State of Washington, rested on the ground that the application for certiorari was a "fragmentary or branch proceeding" (*Bryant* v. *Zimmerman*, 278 U. S. 63, 71), and the Court has continued to hear appeals from orders granting or denying prohibition or mandamus where, as here, the application

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[2] *Luxton* v. *North River Bridge Co.*, 147 U. S. 337; *Southern Railway Co.* v. *Postal Telegraph-Cable Co.*, 179 U. S. 641; *United States* v. *Beatty*, 232 U. S. 463.

[3] *Washington ex rel. McPherson Bros. Co.* v. *Superior Court*, 274 U. S. 726; *Washington ex rel. Perry* v. *Superior Court*, 276 U. S. 626; *Wick* v. *Superior Court*, 278 U. S. 575.

was separate and distinct from the proceedings sought to be stayed. *Bandini Co.* v. *Superior Court*, 284 U. S. 8; *Michigan Central* v. *Mix*, 278 U. S. 492; *St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200.

II

THE STATE OF CALIFORNIA MAY NOT REGULATE THE PRICE AT WHICH MILK IS SOLD TO THE UNITED STATES

The California Milk Control Act under which this case arose[4] declares the production and distribution of fluid milk and fluid cream to be a business affected with a public interest (Sec. 735), and vests in the Director of Agriculture of California authority to prescribe and enforce minimum wholesale and retail prices in any marketing area (Secs. 736.10 and 736.12). Distributors are forbidden to sell or to offer to sell fluid milk to any consumer at less than the prices established by the Director (Sec. 736.13). Distributors are also forbidden to purchase, process, bottle, transport, deliver, or otherwise handle milk which is to be sold in a federal enclave at prices less than the minimum prices prescribed by the Director of Agriculture for the marketing area in which the enclave is located (Sec. 736.3 (a) (6)). Violation of either of these sections by a distributor is a misdemeanor as well as ground for revoking or suspending its license to do business (Sec. 737.7). The provision

[4] Cal. Stats. 1935, p. 922; Cal. Stats. 1937, pp. 1372, 1376 (Cal. Agricultural Code, Div. 4, c. 9, Secs. 735–738).

for violation of which the Director of Agriculture sought to cancel appellant's license is the second of these sections, Section 736.3 (a) (6).

It is clear that California may not regulate the price at which the milk is sold to the United States at Moffett Field. The court below so held in *Consolidated Milk Producers* v. *Parker*, 19 Cal. (2d) 815, decided contemporaneously with the instant case, on the ground that the State had no jurisdiction to fix the price at which milk was sold on a federal enclave (see pp. 18–20, *infra*). The State has not in this case contended to the contrary. Moreover, regardless of where the sales took place, Section 736.13, forbidding distributors to sell at prices below those fixed by State authority, would be invalid as applied to sales to the United States. The reasons, which are set forth in our brief in *Penn Dairies, Inc. and the United States of America* v. *The Milk Control Commission of the Commonwealth of Pennsylvania*, No. 399, this Term, may be summarized as follows:

A State may not regulate the United States in the performance of its governmental functions even by a nondiscriminatory statute of general application. A regulation of the price at which the seller may sell fixes one term of the contract of sale and purchase, and therefore is a direct regulation of the terms on which the buyer must buy even though he is not named in the law. The instant case is to be distinguished from a tax collected from

a seller who deals with the United States but who, so far as the law is concerned, may absorb any part of the tax. It is analogous to the situation which would be presented if a State levied a sales tax on sales to the United States and required the seller to collect the tax from the buyer. The legal incidence of the Milk Control Act, therefore, is on the buyer of the milk as immediately and fully as if it were formally addressed to him. Consequently, where the United States is buyer, application of the Milk Control Act to the sale is an attempt unconstitutionally to regulate a federal governmental function; indeed it is also an attempt to exercise power over the support of the Army and is unconstitutional because that power is vested exclusively in the United States (U. S. Const. Art. I, sec. 8, cl. 17).

We submit for the same reasons that Section 763.3 (a) (6), prohibiting the handling of milk later sold at a price less than that fixed by California, is, as applied to federal purchases, an unconstitutional regulation of the United States. This section prohibits on conditions the "purchasing, processing, bottling, transporting, delivering, or otherwise handling" of milk, and the conditions are price conditions. The lawfulness of the handling therefore depends entirely upon the price which is received at a subsequent sale. This section, as the inevitable and intended result of its terms and not as the result of any business arrange-

ment, regulates the price at which the United States may purchase exactly as does the price law itself. Indeed, that is its only purpose and would be its only result (see pp. 21–23, *infra*). The actual impact of the statute and not the verbal formula must determine its "legal incidence" and constitutionality. Cf. *Wisconsin* v. *J. C. Penney*, 311 U. S. 435, 443–444. Section 736.3 (a) (6), therefore, is invalid for the same reasons as the direct price regulations involved in Section 736.13.

In our brief in the *Penn Dairies* case we have also shown (pp. 31–39) that State minimum price laws cannot be validly applied to purchases by the United States because they are inconsistent with the procurement program established by Acts of Congress. We do not repeat the argument here, for any distinction between the Pennsylvania and California laws is immaterial on this aspect of the case; the inconsistency is not a matter of words but is fundamental.[4]

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[4] Unlike the Supreme Court of Pennsylvania in the *Penn Dairies* case, the court below relied upon Regulation 5–240 (g) (3) of the United States Army in support of its proposition that the competitive bidding statutes were not applicable "when the price is fixed by Federal, State, municipal, or other competent authority" (R. 26). As we have pointed out in our brief in the *Penn Dairies* case (pp. 35–36), the record in that case shows that the regulation was not intended and is not construed by the War Department to excuse competitive bidding under such circumstances. Moreover, as we have also pointed out in that brief, the regulation would not be binding if its meaning is contrary to the Acts of Congress.

There are, however, additional grounds for reversal in this case, which are not present in the *Penn Dairies* case. The California Milk Control Act, we submit, is invalid as applied to the purchases made by the United States at Moffett Field because the State of California has no jurisdiction over that enclave.

III

CALIFORNIA MAY NOT FORBID THE HANDLING OF MILK IN CALIFORNIA, WHICH IS SOLD AND DELIVERED ON TERRITORY SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE UNITED STATES, AT PRICES BELOW THOSE FIXED BY STATE LAW

A. *California may not regulate conduct within her borders for the sole purpose of controlling the price at which milk is sold on territory subject to the exclusive jurisdiction of the United States.*

The contract for the sale of milk to the United States, entered into by appellant and the War Department, was signed by the Quartermasters' Department of Moffett Field, and the sale and delivery of the milk took place on Moffett Field (R. 2, 9, 15). Moffett Field is located in Santa Clara County, California, about 35 miles southeast of San Francisco (R. 9). More than fifteen years ago, it was purchased by the United States for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, and is still used by the Government for such purposes (R. 4). Article 1, section 8, clause 17 of the Federal Constitution provides that Congress shall have power

to "exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Section 34 of the Political Code of California (R. 4) gave consent to the purchase, and accordingly, the power of "exclusive legislation" was vested in the United States. *Standard Oil Co.* v. *California*, 291 U. S. 242; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *United States* v. *Unzeuta*, 281 U. S. 138; *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439. Cf. *Collins* v. *Yosemite Park*, 304 U. S. 518; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.*

In view of these decisions the State apparently does not contend that it can regulate the price at which goods are sold on Moffett Field. The court below so decided in *Consolidated Milk Producers* v. *Parker*, 19 Cal. (2d) 815. Its decision is plainly right under *Standard Oil Co.* v. *California*, 291 U. S. 242, 245, wherein this Court held:

> * * * A State cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States.

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* In order to maintain continuity of law, the law of the area continues in effect after acquisition by the federal government, but it is the law of the federal government and not of the State. Subsequent state laws do not modify the law of the area. See *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94. The California Milk Control Act was enacted after the United States acquired Moffett Field (see pp. 14, 18, *supra*).

Likewise, we understand that there is no contention that California may regulate appellant's conduct in a federal enclave by reason of the fact that appellant is a California corporation (R. 1); the contract of sale involved was made and was to be performed outside California, and the purchaser, the United States, of course was not a corporation which had sought the privilege of doing business within California. For this transaction, therefore, "no privilege or license by California was needful" (*Conn. General Co.* v. *Johnson*, 303 U. S. 77, 82). Appellant clearly had the right to make contracts outside California and beyond her jurisdiction without regulation by California. *Compania General de Tabacos de Filipinas* v. *Collector*, 275 U. S. 87, 92; *Alaska Packers Assn.* v. *Comm.*, 294 U. S. 532, 540, and cases cited.[7]

Skiriotes v. *Florida*, 313 U. S. 69, is not to the contrary. There the Court held that in the absence of conflicting federal legislation Florida could regulate the conduct of its citizens upon the high seas. But there is a clear difference between regulating the conduct of a citizen on seas over which no other sovereignty asserts jurisdiction and regulating conduct within territory subject to the exclusive jurisdiction of another sovereignty in a matter of its domestic affairs.[8] The distinction has always been silently observed; in the cases holding that the

[7] See p. 27, n. 12, *infra*.

[8] See p. 29, n. 13, *infra*.

State may not legislate effectively concerning matters occurring in territory subject to the exclusive jurisdiction of the United States no inquiry has been made into the question of citizenship. Any other rule would create embarrassing conflicts of authority, would enable one State to interfere with the domestic policies of the other and would disrupt the federal system. We take it as our premise, therefore, as did the court below, that California may not regulate the price at which milk is sold by appellant on Moffett Field.

The question is whether California may consistently with due process avoid the foregoing limitation of her powers and revoke appellant's license because it *handled* milk in California which was subsequently sold on Moffett Field at prices below those fixed by the State law. We submit that such revocation would take appellant's property without due process of law, basing our contention upon two propositions. First, in handling the milk appellant was guilty of no act or omission in California which was itself contrary to the public policy of California; California has seized upon such acts for the sole purpose of regulating contracts made beyond its borders, which it lacks jurisdiction to control directly. Second, while a State may forbid conduct within its borders that is itself contrary to its public policy regardless of the repercussions beyond its borders, it may not regulate conduct, otherwise within its competence to control, for the sole

purpose of regulating matters beyond its jurisdiction, even though the repercussions of the conduct beyond its jurisdiction in turn affect local policies.

1. It is clear that we have characterized Section 736.3 (a) (6) of the Milk Control Act fairly. The declaration of policy prefacing the Act sets forth the purpose to promote orderly marketing of essential agricultural commodities and to ensure an adequate supply of wholesome milk. The acts done by appellant in California which are covered by Section 736.3 (a) (6)—"purchasing, processing, bottling, transporting, delivering or otherwise handling" milk—manifestly were not contrary to that policy. Section 736 (a) (6) conditions their lawfulness entirely upon what is done outside California. If the milk is sold outside California at one price, the handling is lawful; if it is sold at another price, the handling is unlawful. In each case the acts done in California are precisely the same. Clearly, then, handling itself is not against the policy of the State. The only act done by appellant which California deemed inimicable to her welfare was to sell milk in the federal enclave at lower prices than the state authorities prescribed and this appellant was free to do (see pp. 18-20, *supra*).

The legislative history of Section 736.3 (a) (6) also shows that its only purpose is to prevent

such sales. Prior to 1941 the Milk Control Act contained price-fixing provisions, which the California authorities evidently believed to be ineffective to fix prices for sale of milk in federal enclaves. See *Consolidated Milk Producers* v. *Parker*, 19 Cal. (2d) 815. On April 28, 1941, a Senate Joint Resolution was adopted by California, memorializing the Congress of the United States to enact legislation requiring the federal government to comply with the California Milk Control Act.[9] Congress failed to respond and California passed the amendment in question, which was approved by the Governor on July 16, 1941.[10]

Although the court below said (R. 21) that the State had regulated the handling of fluid milk within its jurisdiction with the object of stabilizing the production of a commodity vital to the public health, nevertheless the court below also recognized that appellant's acts in California were not themselves contrary to the public policy of the State. The court explained that the "most real danger to the prescribed minimum lies in sales by distributors at lower prices on areas within the exclusive jurisdiction of the federal government, where transactions cannot be regulated by the State" (R. 18). The purpose of Section 736.3 (a) (6) the court said was to deal with these "elusive evils"

[9] Cal. Stats. 1941, Concurrent and Joint Resolutions, c. 65, p. 3402.

[10] Cal. Stats. 1941, c. 1214, p. 3011, sec. 3.

(R. 18), and later it pointed out that "*the State is concerned * * * with the effect of the price* * * * (R. 21).

2. The fact that none of the acts specified in Section 736.3 (a) (6), and no other act done by appellant within California, was itself contrary to the public policy of the State is decisive of the invalidity of that section. It is true in a general sense that California has power to regulate appellant's conduct within California and "that a State may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its jurisdiction, and that its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems" (R. 21). But this Court has ruled (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434):

> * * * it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result. * * *

While, therefore, a State may forbid, regardless of repercussions beyond its borders, any conduct within its borders (whether an act or an omission to act) that is contrary to its public policy (*Osborn* v. *Ozlin*, 310 U. S. 53, 62–63; *Alaska Packers Assn.*

v. *Comm.*, 294 U. S. 532, 541), a State may not seize upon innocent acts otherwise permitted in order to regulate conduct which the State is forbidden to reach because it takes place in territory subject to the exclusive jurisdiction of the United States. Any other conclusion would enable a State to stultify the Constitution by a careful choice of words.

There are many illustrations of the principle stated in the *Tafoya* case. A State may fix conditions on which it will open its courts but it may not deny access to its courts to a foreign corporation seeking to collect the price of goods sold in interstate commerce until the corporation agrees to appoint an agent in the State for service of process; the condition would regulate interstate commerce. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203. Similarly, a State may not condition the license of a foreign corporation to do a local business upon its refraining from suing or defending in the federal court. *Ferral* v. *Burke Construction Co.*, 257 U. S. 529. In both these cases the State had a "right" to regulate the subject matter but the statute was invalid because it seized upon that subject merely as a means of controlling indirectly conduct beyond its competence to control directly because the power of control was vested exclusively in the federal government.

The same principle prevents a State from using things within its borders as a fulcrum for regulating conduct beyond its territorial jurisdiction. A

State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the corporation has tracks and does business within the state. *New York, Lake Erie & W. R. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646. In the *Tafoya* case a State statute forbidding insurance companies authorized to do business in the State to make payments to nonresidents of premiums on risks within the State was held unconstitutional. It was thought that this was not a regulation of the business of the insurance company within the State, but was directed exclusively at the making of contracts beyond its borders. Similarly, "a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state" (*Alaska Packers Assn.* v. *Comm.,* 294 U. S. 532, 540). *Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, 348; *Compania General de Tabacos de Filipinas* v. *Collector,* 275 U. S. 87.

Whatever doubt they may cast upon its application in some cases, subsequent decisions have not modified the principle that "a so-called right" may not be used "as a part of a scheme to accomplish a forbidden result." (*Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434).[11] In the cases chiefly

[11] There may be some question concerning the extent to which the *Tafoya* case has been overruled by *Osborn* v. *Ozlin,* 310 U. S. 53. In both cases the State had a legitimate interest in building up local insurance agencies by requiring

relied upon by the court below those acts or omissions to act within the State which the State statutes proscribed were themselves against the public policy of the State. In the special circumstances revealed in the *Alaska Packers* case, California had a legitimate interest in requiring compensation to be made by the company doing business in California for injuries received outside its borders by employees who annually returned to California at the close of the season to collect their wages. Making an employment contract in California which required the workman to return there and then failing to pay him compensation for his injuries from an industrial accident, was conduct which was itself opposed to the public policy of the State. Similarly, the acts discouraged by the Virginia statute sustained in *Osborn* v. *Ozlin*, 310 U. S. 53—doing business in Virginia by writing policies on local risks without payment of a commission ensuring the active use of resident agents—was itself opposed to the public policy of Virginia, which had a permanent interest in the local risk and in stimulating the activities of local agents charged with protecting the property from destruction. The *Ozlin* case specifically recognized and

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that payments be made to them in connection with local risks, for such a measure would tend to protect property within the State. The two cases are distinguishable in that it might be thought arbitrary and capricious to prohibit all payments to agents outside the State in connection with local risks, whereas it would be a reasonable measure simply to require that some payments be made to the local agencies.

distinguished those instances, like the instant case, in which a "so-called right is used as part of a scheme to accomplish a forbidden result" (p. 65).[12]

It is, of course, immaterial that California was seeking to regulate the selling price of milk in the

[12] There is a second difference between cases sustaining state taxation or regulation of extra state transactions and the case at bar. In those cases, either the transaction was itself local (e. g., *National Union Fire Insurance Co.* v. *Wanberg*, 260 U. S. 71; *Palmetto Fire Insurance Co.* v. *Conn*, 272 U. S. 295) or at least was consummated between two parties who were residents of, or were authorized to do business in, the State. *Compania General de Tabacos de Filipinas* v. *Collector*, 275 U. S. 87; *Alaska Packers Assn.* v. *Comm.*, 294 U. S. 532; *Osborn* v. *Ozlin*, 310 U. S. 53. For this reason, *A. & P. Tea Co.* v. *Grosjean*, 301 U. S. 412; *Wisconsin* v. *J. C. Penney*, 311 U. S. 435; and *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, do not support the decision below. The regulation of a company authorized to do business within a State, in respect of its business with residents of the State, although consummated outside, was held to be a legitimate "burden as a price of enjoying the full benefits flowing from" its local business. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 364. The Court specifically noted, however, that the regulations would not be valid as applied to companies not qualified to do business within the State, and this as a result of the "impotence of state power" (*id.*). On the other hand, wherever a State has sought to tax or regulate a transaction between a resident of the State or a company doing business in the State and a company not doing a local business, the Court has held the tax or regulation to be unconstitutional. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346; *Compania General de Tabacos de Filipinas* v. *Collector*, 275 U. S. 87; cf. *Conn. General Co.* v. *Johnson*, 303 U. S. 77. In the case at bar, the contract was made and to be performed out of the State of California. The purchaser, the United States, was not a corporation

federal enclave in order to effectuate a reasonable State policy. It is no more permissible for a State to carry out local policies by indirectly regulating matters beyond its competence than it is for the State to do so by direct control. Thus, in the *Tafoya* case the statute was directed to the legitimate policy of building up responsible insurance agencies within the State, and in *New York, Lake Erie & W. R. R. Co.* v. *Pennsylvania, supra,* the State statute aided in the collection of a lawful tax. But the means chosen were invalid because they regulated conduct outside the State.

We submit, therefore, that the challenged section of the Milk Control Act is an unconstitutional attempt by California to regulate the price at which milk is sold in territory subject to the exclusive jurisdiction of the United States. The power to regulate such prices is vested exclusively in the United States (U. S. Const., Art. I, Sec. 8, cl. 17). As a result the question here is not merely whether California may interfere in the domestic affairs of another State in order to carry out her policies, but

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which had sought the privilege of doing business in the State, and, indeed, had done no business in California. This was a contract made and to be performed outside of California "and for its transaction no privilege or license by California was needful." *Conn. General Co.* v. *Johnson,* 303 U. S. 77, 82. Under this view the statute here involved fails to meet the fundamental requirement of due process that a State cannot "penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state." *Alaska Packers Assn.* v. *Comm.,* 294 U. S. 532, 540.

is whether it can exercise by indirection the power of exclusive legislation which the Constitution vests in Congress.[13] No form of words enables a State to reach "beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere" (*Osborn* v. *Ozlin*, 310 U. S. 53, 62). The direction not to handle in California milk sold in the federal enclave at prices below those fixed by State law was therefore a nullity and appellant's failure to comply was no wrong. It would be arbitrary, unreasonable and a denial of due process for the appellees' officials to revoke the license without lawful grounds.

B. *California may not erect barriers to commerce between California and territory subject to the exclusive jurisdiction of the United States for the purpose of fixing the price at which her products are sold in such territory.*

In the preceding section we have argued that California may not proscribe *any* conduct within

[13] It seems probable that a State of import could regulate the prices to be charged consumers on local sales of milk in the State in the absence of inconsistent federal legislation. *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23; *Public Utilities Commission* v. *Landon*, 249 U. S. 236. Any limitations arising from the commerce clause upon the power of a State of import to fix such price would not apply to Congress, for when it legislates for an enclave, Congress exercises the powers both of a State and general government. See pp. 31–32, *infra*.

its boundaries (which is not itself opposed to the public policy of the State) for the sole purpose of fixing the price at which milk is sold on a federal enclave. In addition, the California statute must fall because the conduct which the statute attempts to regulate is the preparation and transportation of milk which is to move outside the State; the statute expressly forbids the movement of milk from California into the federal enclave unless the price at which it is sold in the enclave is considered adequate by California authorities to build up the economy of the State. California has no more authority to regulate such commerce than it would have if Moffett Field were in another State, and, if this commerce were interstate, California could not constitutionally erect the barrier which is here involved.

1. Although Article I, section 8, cl. 3, of the Constitution expressly grants to Congress only the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes", the court below concluded that the power to regulate commerce between a State and federal territory was also conferred by this provision (R. 22–23). Notwithstanding verbal difficulties, this view finds strong support in the decisions of this Court. It has been held that commerce between a territory and a State is interstate commerce (*Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; cf. *Inter-Island Steam Navigation Co.* v.

Hawaii, 96 F. (2d) 412, affirmed, 305 U. S. 306), and that Congress cannot delegate power to a local body to regulate commerce between a State and the District of Columbia because such commerce falls "within the domain of the great, distinct, substantive power to regulate commerce * * *." (*Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147, 148). Cf. *Galloway* v. *Bell*, 11 F. (2d) 558 (App. D. C.). Territory ceded by the States to the federal government has a constitutional status identical with that of the District. The federal jurisdiction over both is derived from the same clause of the Constitution (U. S. Const., Art. I, Sec. 8, cl. 17).

But it is unnecessary to rely upon the commerce clause alone. Article 1, Sec. 8, cl. 17 grants to Congress the power of "exclusive legislation" over territory ceded by a State and this authority is enlarged by the "necessary and proper clause" to include power to enact all appropriate incidental legislation. In respect of such territory, therefore, Congress has "the combined powers of a general and a State government" (*Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147). It may regulate the local affairs of a federal enclave in a local way or it may extend the legislation into the States to achieve its purposes wherever "necessary and proper." *Cohens* v. *Virginia*, 6 Wheat. 264, 424–428, 447; *O'Donoghue* v. *United States*, 289 U. S. 516, 538–539. Consequently Congress certainly has an affirmative power over commerce between a State and a federal enclave which is at least as

great as its power over commerce between two States. It may determine the terms and conditions upon which goods may enter and leave an enclave and may remove any obstructions to the flow of goods into an enclave even though the obstruction exists on State territory. Moreover, as *Stoutenburgh* v. *Hennick, supra,* shows, this power is possessed by the Congress as part of the powers of the general government and not as one of the powers of a State.

The question, therefore, is whether the grant of affirmative power to Congress to regulate commerce between a State and a federal enclave by implication forbids a State to regulate such commerce. We believe that the power of Congress is exclusive at least to the same extent that the power of Congress over commerce between two States is exclusive. In the first place, Article 1, Sec. 8, cl. 17, expressly provides that the power of Congress to legislate for federal enclaves shall be "exclusive", and this definition must be as applicable in respect of the commerce of the enclave as in respect of its purely domestic affairs. Secondly, the analogy of the commerce clause is persuasive. Although the commerce clause does not explicitly forbid the States to regulate interstate commerce which Congress has not regulated, yet it is held that the States are powerless to do so when the matter is not one of local concern (*Cooley* v. *Board of Port Wardens,* 12 How. 299) or "when state legislation nominally of local concern is in point of fact aimed

at interstate commerce" (*South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185–186). Such decisions stemmed from the knowledge that the Constitution embodied the political judgment that the welfare of the former colonies required the prevention of trade discriminations and the elimination of State imposed barriers or obstacles to the free flow of goods between two States, excepting only restraints imposed by a federal authority. To have permitted a State to erect barriers to the movement of goods in order to build up its economy at the expense of territory subject to exclusive federal jurisdiction would have been little less disturbing to the economy of the federal territory and, in addition, would have seriously embarrassed the activities of the new federal government. And it is wholly unreasonable to suppose that the Constitutional Convention intended to leave the States greater power to interfere with or destroy the economy of federal territory by erecting trade barriers than they were to be permitted to exercise in respect of each other. Cf. *Crandall* v. *Nevada*, 6 Wall. 35; *The Federalist*, No. XLII (Dawson's ed. 1863).

2. Judging the power of California over the commerce here involved by the tests applicable to barriers to interstate commerce, it is clear that the prohibition against handling milk in California which is sold in the federal enclave at a lower price that California considered proper is unconstitu-

tional. The court below sustained the statute on the ground that the dairying industry was dominantly a matter of local concern. It held (R. 23):

> Focussed as it is upon a State problem the State act *despite its repercussions upon interstate commerce*, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation. [Italics added.]

Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, was considered a controlling precedent.[14]

But this description of the State law scarcely fits its provisions. Section 736.3 (a) (6) does more than affect commerce between California and federal enclaves through "its repercussions." By expressly proscribing "transporting" and "delivering" such milk, it forbids any dealer to engage

[14] The court below considered the question whether the California Milk Control Act was invalid because Congress had legislated in the same field by enacting the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, reenacting and amending certain sections of the Agricultural Adjustment Act of 1933, 48 Stat. 31. It concluded that there was no conflict because no federal milk marketing order had been issued covering the area in question. We agree that there is no conflict between the sections of the California statute which are involved here and the Agricultural Marketing Agreement Act. The former fix minimum prices to be paid by retailers or consumers to dealers; the latter chiefly authorizes the Secretary to fix minimum prices to be paid by dealers to producers. Section 10 (i) of the Agricultural Marketing Agreement Act shows plainly that there was no intention to exclude the States from fixing minimum

in such commerce unless he charges persons in the enclave a price fixed by California law. Likewise, the *Eisenberg Farm Products* case is not even persuasive here. No question is raised here concerning the validity of those provisions of the Milk Control Act which fix the prices to be paid by handlers to producers. That was the only question presented in the *Eisenberg Farm Products* case, for, as the Court carefully pointed out (306 U. S. 346, 352):

> The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York, * * *

In the instant case, California has sought to fix

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resale prices for milk, a field in which they had long legislated (See e. g. *Nebbia* v. *New York*, 291 U. S. 502). And the committee reports state (H. Rep. 1241, 74th Cong., 1st Sess., pp. 22-23; S. Rep. 1011, 74th Cong., 1st Sess., p. 15):

> Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the field of the States, for the limitations of the act and the Constitution forbid Federal regulation in that field, and this provision does not indicate the contrary. Nor is there anything in the provision to force States to cooperate. Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other.

It is apparent, therefore, that Congress intended to leave to the States their full constitutional power in regard to resale prices but recognized, of course, that the constitutional restrictions would continue to be binding.

the price at which the milk is sold in the federal enclave. The purpose is to retain the wealth of her citizens and build up her economy at the expense of persons within the enclave by prohibiting the former from exporting milk to be sold at prices considered by California to be detrimental to her economy. This is plainly beyond California's power. It has always been recognized that a great purpose of the commerce clause was to deprive the States of power to fix terms upon which they would permit the movement of legitimate articles of commerce into or out of a State in order to build up or protect the local economy at the expense of persons in other States. II Farrand, *Records of the Federal Convention*, p. 208; III *id.*, pp. 478, 547, 548; *The Federalist*, No. XLI (Dawson's ed. 1863).[15]

The decision in *Baldwin* v. *Seelig*, 294 U. S. 511, not only illustrates the principle but is a precise precedent for our position. The Court held that the State of New York could not exclude, or prohibit a dealer from selling within her borders, milk purchased in the State of Vermont at a price be-

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[15] *Parker* v. *Brown*, No. 46, this Term, is not to the contrary. The California statute as here applied is not a regulation of persons not engaged in commerce whose products later move in commerce but "a regulation of those who engage in the commerce by selling the product interstate" (p. 14). And, even though the matter is one suited to local regulation of some kinds, it is clear, for reasons stated above, that a State may not erect an export barrier by fixing the price to be charged for its goods *after* they have left the State.

low that which another and valid section of the New York statute required to be paid to New York producers. The converse situation is presented here. California is seeking to prohibit a dealer from handling within her borders milk sold in the enclave at a price below that which another section of the statute requires to be paid by California purchasers. But in each case the attempt is to preserve local wealth by preventing free trade among the States. In *Baldwin* v. *Seelig*, the barrier was intended to improve the economic condition of domestic producers by preventing dealers from importing and selling "cheap goods" from Vermont, which would tend to displace New York milk in the market until its cost was reduced. In the instant case, the barrier is an effort to maintain the wealth of domestic producers by preventing dealers from exporting and selling the milk at a low price and thus disabling themselves from paying high prices to producers. In each case, the "state legislation nominally of local concern * * * by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell* v. *North Carolina*, 187 U. S. 622, 626." *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185–186. And wherever the effort is thus to gain a local economic benefit by erecting a barrier to the flow of goods, the statute is invalid,

whether the commerce seeks to flow into or out of the State. Compare *Baldwin* v. *Seelig, supra,* and *Edwards* v. *California,* 314 U. S. 160, 173–174, with *Foster Packing Co.* v. *Haydel,* 278 U. S. 1; and *Pennsylvania* v. *West Virginia,* 262 U. S. 553. This is true even where intrastate commerce is subject to like regulation, as indeed it was in *Baldwin* v. *Seelig, supra.* Cf. *State Board* v. *Young's Market Co.,* 299 U. S. 59, 62; *Case of the State Freight Tax,* 15 Wall. 232, 274, 277.

We do not overlook the fact that the California legislature regarded the statute as a measure for protecting the public health. An argument based upon such considerations was made by New York and rejected in *Baldwin* v. *Seelig, supra.* In that case it could be said, on behalf of the State, not only that the price received by New York farmers must be protected against competition in order to protect the supply of pure milk (pp. 522–523), but also that the price received by the Vermont farmer directly affected the wholesomeness of his product (pp. 522–526). Here the second branch of the argument cannot be made at all. And the effect on the income of California producers of sales in the federal enclave at a competitive price is certainly more remote than the effect upon the New York farmer of the availability of cheaper milk in Vermont. In California the danger is said to be that California dealers will so impoverish themselves by selling milk at too low a price on federal

enclaves as to disable themselves complying with the State law fixing the price which they must pay to producers for the milk (R. 35). It has been the judgment of Congress [16] and of the Department of Agriculture [17] that milk prices can be fixed and enforced at the producer level alone. But whatever the danger, it does not justify California in dealing with a local problem which is at first economic, and only indirectly a matter of public health, by seeking to "neutralize the economic consequences of free trade among the States". *Baldwin* v. *Seelig, supra,* p. 525.

CONCLUSION

The order of the Supreme Court of California denying petition for a writ of mandamus was final and appealable under Section 237 of the Judicial Code. The California Milk Control Act attempts to regulate the price to be paid by the United States for milk purchased for the armed forces; its legal incidence is on the United States. As thus applied, it is invalid both because the States have no power directly to regulate the procurement activities of the Federal Government and because the

[16] See Section 8c of the Agricultural Adjustment Act of 1933 as amended and reenacted by the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246.

[17] See for examples the milk marketing orders involved in *United States* v. *Rock Royal Co-operative*, 307 U. S. 533 (New York); *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588 (Boston); *United States* v. *Wrightwood Dairy*, 315 U. S. 110 (Chicago).

statute is inconsistent with Acts of Congress establishing a federal procurement policy. Moreover, as applied to sales on Moffett Field, the statute is unconstitutional for two additional reasons: California has no power to fix the price at which milk is sold on Moffett Field either directly or indirectly by prohibiting milk dealers from handling in California milk which is later sold on Moffett Field at a price below that fixed by California. Second, California may not constitutionally erect a barrier to the flow of commerce into territory subject to the exclusive jurisdiction of the United States for the purpose of fixing the price at which the goods are sold in that territory.

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APPENDIX

The pertinent provisions of the California Milk Control Act (Cal. Agric. Code (Deering, 1937) Division 4, c. 10, §§ 735–738, as amended Cal. Agric. Code (Deering, 1941 supp.) pp. 462–474) are as follows:

§ 735.3. Definitions. As used in this chapter:

* * * * *

(f) *"Distributor"* means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributer" shall not include any of the following: (1) Any retail store that is not engaged in processing and packaging fluid milk or fluid cream, (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not engaged in processing and packaging fluid milk or fluid cream, (3) any person owned or controlled by one or more retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor.

* * * * *

(g) *"Retail store"* means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

* * * * *

(j) *"Consumer"* means any person who purchases fluid milk, fluid cream or dairy products for consumption.

* * * * *

§ 736.3. Requisites of plan: Optional provisions: Sales stimulation programs. Any stabilization and marketing plan shall contain the following provisions:

(a) *Unfair practices.* Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

* * * * *

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices

established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California; provided, however, that if such fluid milk or fluid cream is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect, then the distributor shall pay the producer thereof not less than the minimum prices established in such plan in the marketing area wherein such milk or cream is sold or distributed; and provided further, that in the event such fluid milk or fluid cream is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such milk or cream may be paid for by the distributor to the producer thereof at not less than the average price paid by distributors to producers for milk or cream of similar grade and quality at the plants in the vicinity where such milk or cream is so sold or distributed, as such prices are determined by the director from contracts required to be filed with him pursuant to this section.

* * * * * *

§ 736.11. Designation of prices in marketing areas. The director shall, as soon as possible after the effective date hereof, in all

marketing areas wherein a stabilization and marketing plan is in effect under the provisions of this chapter, designate and prescribe or provide methods for designating and prescribing,

(a) *Minimum wholesale prices* which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor; and

(b) *Minimum retail prices* which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

* * * * *

§ 736.13. Sales at less than established prices: Discounts, etc., prohibited: Schedules of prices: Filing: Presumption: Conditional offers and agreements: Meeting filed prices. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article, and the use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store,

restaurant, confectionery or other place for consumption on the premises, or consumer or any retail store, restaurant, confectionery or other place for consumption on the premises, buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, whether by discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift, or otherwise and whether any such discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift applies directly to fluid milk or fluid cream or is allowed upon or in connection with the sale or handling of any other commodity or product, is hereby prohibited. * * *

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